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Reply Brief of Counsel for Petitioner.

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CHEW HONG LUNG,

Petitioner,

vs.

JOHN H. WISE, Collector.

TERSE REPLIES TO THE GOVERNMENT BRIEF.

ALBERT COMSTOCK,

[redacted] B. BROWNE,

CHARLES PAGE,

Counsel for Petitioner.

E. O. Sargent, Printer and Binder, Syracuse, N. Y.

In the Supreme Court of the United States

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Terse Replies to the Government Brief.

I.

The importer's claim for free entry under paragraph 730 does not depend only on the word "tapioca" therein. The paragraph equally provides free entry for the merchandise if it be *cassava* or *cassady*. Under the stipulation and proofs, while the substance is one of the three forms of commercial tapioca, it is the only form of cassava known in the world's commerce. There is no testimony of any trading in the shrub or the root; all the proofs and all the authorities demonstrate that neither could be the subject of trade,—the poisonous element of the juice must be eliminated, and this of course is only practicable while the root is fresh and soft, and hence where and when it is first obtained from the ground. The tapioca flour is the first product after eliminating the said juice (finding 3 of circuit court, Record page 11).

Century Dictionary: "Cassava; (2) the starch derived from the cassava plant."

II.

It was never proved or stipulated that the substance (in controversy) is "used in Eastern states *for starch purposes*" (as asserted at p. 4). This is a complete mistake. The stipulation was (Record page 17,—V.) that it is "used in the Eastern states by calico printers and carpet manufacturers to thicken colors, and in the manufacture of a substitute for gum Arabic and other gums. It is also sometimes used for sizing cotton goods." The testimony contains no word of statement or indication that any of these are "starch purposes", and on the testimony of the chief handlers of tapioca flour in the United States, in the *Townsend* case, which by stipulation (Record page 18) is made substantially a part hereof, none of them are starch purposes, and the substance has no general use for any starch purpose. The circuit court in San Francisco, evidently by inadvertence, amplified in its seventh finding this stipulation of fact No. 5, but its action in so doing can have no weight, because it is a finding unsupported by any evidence (or stipulation) and against the entire weight of the evidence.

III.

The contention that tapioca flour is not embraced in the established trade meaning of the word "tapioca", is futile. The great preponderance of evidence in the case at bar from witnesses who had any commercial knowledge of the substance, was clearly that throughout this country and the world at large the term "tapioca" has always included the three forms,—pearl, flake and

flour. The Government witnesses whom our opponent cites had no trade knowledge of this third form, and did not testify that the term "tapioca" excluded it, but merely that *they only knew* tapioca in the pearl and flake forms. In the *Townsend* case the commercial testimony was competent, ample, and unanimous in proving the triple meaning as prevailing in trade. On the Western evidence alone the circuit judge found as a conclusion of fact (Record page 12, V.) that "in the general importing markets of the United States * * * the term 'tapioca' includes that article in three forms, viz: flake tapioca, pearl tapioca and tapioca flour." And the appellate court (Record page 177) confirmed this finding. Our opponent assumes a hopeless task in asking this court to reverse it.

IV.

The experiments of many witnesses,—expert laundrymen,—showed from the employment of tapioca flour in the place of starch, results so poor as to demonstrate its unfitness. Our opponent contends that this was because of *want of experience* in so employing this substance. Perhaps true, but the important point is that although thirty-one witnesses were called, none could be found who had experience of this sort. This is because, as also amply proven otherwise, *practically no one but the Chinese uses tapioca flour as starch.*

In the *Townsend* case Mr. Duryea (President of the National Starch Co.) testified that in thirty-seven years' practice of making and selling starch from "generally the range of substances out of which starch is manufactured", he had never used tapioca flour, was not familiar with it, and *knew nothing about it.*

V.

As to the assertion that the article in controversy is not scientifically a flour, and that it is not edible; the first proposition is completely irrelevant, and the second is at variance with the stipulations and proofs. At page 18, Record, it is stipulated that the merchandise in suit is the same as that involved in various decisions of the courts, general appraisers and treasury department, during the last twenty-five years. The substance covered by these decisions *was* tapioca flour, and *was* edible. The circuit court (Record page 12, V.) and the circuit court of appeals (Record page 177, fol. 261) both found as fact that this substance is commercially known as "tapioca flour". The appellate court in the *Townsend* case found the same fact. The stipulation on page 17, Record (IV.) agrees that it is used for food purposes. And ample testimony in the *Townsend* case proved that it was so used in pastry or puddings, in candy, in soups and in ice-creams.

The right of this substance to free entry does not depend on its being scientifically a flour; the free list does not provide for tapioca flour *eo nomine*; and the only relation between *flour* and the question at issue is that the proofs, stipulations and findings all show a substance *called* "tapioca flour" to be one of the forms of commercial "tapioca", and that the substance in controversy is the so-called "tapioca flour".

Under a provision for free entry of sulphur or emery, it would be useless to dispute the right of substances commercially designated "flour sulphur" and "flour emery" to such free entry, on the ground that they were not glutinous and sugary enough to be true flours, and equally idle to point out that they were inedible.

VI.

That the rule of commercial designation has no application to this case (pp. 11–12).

This court has held, in

Robertson vs. Salomon, 130 U. S. 412

that the "commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws". That was a case where the article in controversy was beans, and the tariff provisions under discussion were for "vegetables" and "seeds".

Bogle vs. Magone, 152 U. S. 623, involved the question whether "sauces" was a tariff term subject to the rule of commercial designation, and the court said that fish pastes were not necessarily sauces of any kind; "still less, that this is so clear as to exclude the usual test of commercial designation."

The circuit court, sustaining the importer (Record page 12, V.) and the appellate court, overruling him (Record page 177 fol. 261) both decided that the substance in suit was an established member of the class or group known to trade and commerce under the name "tapioca." The *Townsend* case separately and amply establishes the same fact, hence it seems a waste of time to dispute in this court either the relevancy of the rule or that the substance at bar is well within it on the proofs.

The fact that on the Pacific coast the term "China starch" obtains, is absolutely unimportant. If conceded, it constitutes just such a local and partial exception to a definite and general commercial designation, as this court has held incompetent to affect the tariff character of merchandise.

VII.

Our opponent says the tariff test of use is of all tariff tests the most difficult to apply. In this we agree, and the fact renders the free-list designation of tapioca and cassava the more clearly controlling as specifying the substance in controversy without doubt or difficulty.

If chief use means (as here asserted) the only profitable or practical use,—for which assertion we know no authority,—the chief use of tapioca flour is not as starch.

Fitness for use is completely negatived by the record. Many witnesses testified expertly that it was not fit; no witness who had tried it testified clearly that it was fit, and the examples illustrating its use proved its unfitness more clearly than words. The circuit court found (Record page 15 folio 22) that it is "physically" fit, but seems rather to have intended "scientifically" or "abstractly" fit, for the opinion at once discriminates from the practical fitness indicated by common use. The conclusion of the appellate court as to its fitness is vitiated by the misconception that the uses throughout the country for bookbinding, calico printing and the like, were starch uses and had been stipulated to be such; a fallacy which we have already cleared away.

The assertion that the substance is "chiefly used by the Chinese for laundry purposes", must mean: chiefly used, *so far as the Chinese are concerned*, for laundry purposes. The food use is established by stipulation, as already pointed out, and the whole tenor of the record, here as well as in the *Townsend* case, shows that the preponderant use is not by the Chinese at all, but by the interests and for the purposes specified in the agreed fact V.

The assertion of the appellate court that one general use is as an "adulterant in the manufacture of

candies and other articles" is another of those mistakes which have crept into the record of the case, nothing in testimony or stipulation giving any foundation for it. It is amply proved that it is used as a food, or as an ingredient in food, but neither proved nor implied that it is so used as an adulterant.

VIII.

That the meaning of "starch" in the tariff phrase "fit for use as starch", depends on that of the verb "to starch" (pp. 15-16), is not only fallacious, but the proof lies in the very definitions of the verb cited by our opponent, each of which refers directly to the noun "starch". The importance of this is that *to stiffen* is not necessarily *to starch*. *Starching* is stiffening *with starch*; stiffening with anything else, as glue, sizing, flour paste, albumen,—is not starching, and so far as the uses of tapioca flour are for stiffening (which chiefly they are not) they are no more starch uses than are the like uses of glue, etc.

IX.

That the decisions rendered prior to 1890 had characterized tapioca as a "root flour" for tariff purposes (pp. 18–20). This involves complete misconception of these rulings, to which we invite attention.

Treasury decision 3161 (of 1877) distinctly held it free as tapioca.

Treasury decision 5802 (of 1883) held both the free list provisions for root flour and for tapioca applicable.

Treasury decision 7971 (of 1887) held it free as tapioca and not as root flour.

Treasury decision 9031 (of 1888) took the same ground, despite the importer's claim that it was a root flour.

The case of Chung Yune vs. Kelly, 14 Federal Reporter, 639 (decided in 1882) is wrongly analyzed by our opponent (page 18). The importation there involved was made in 1879, and protest, appeal and complaint in the action all claimed free entry for the merchandise as *sago flour*. The court overruled this claim *because the substance proved not to be sago flour*, and the importer must recover under his protest if at all. "Therefore", said the court, "it is of no avail to the plaintiff in this action that it now appears that this article is not dutiable, and ought not to have been charged with duty, because root flour, tapioca and cassava are all on the free list as well as sago". The case involved not only the provision for free entry of root flour in the Act of 1872, cited by our opponent, but also that for the free entry of tapioca and cassava in the Act of July 14, 1870 (16 Stats. 265–268).

The decisions since 1890 (referred to on our opponent's page 19) are inconclusive. No. 10277 merely cautioned collectors against passing free, as tapioca, sago, etc., substances not in fact such. No. 10613 did not relate to tapioca flour at all, but to sago flour, and directed that the starch duty should be assessed, "leaving the importers, if dissatisfied, to their remedy under Section 14 of the Act of June 10, 1890". No. 10954 was a ruling of the general appraisers, and on an entirely different substance from tapioca flour, viz: arrowroot. No. 11406 (G. A. 689), which our opponent thinks it worth while to cite to this court, is the decision of the general appraisers which was reversed by the circuit court of appeals in the *Townsend* case, the Townsend protest being decided by the board on the authority of G. A. 689 and the evidence taken in connection therewith. The other decisions of the

board, prior to the final decision of the Townsend case, are clearly unimportant, and we must challenge our opponent's assertion that any of them "were acquiesced in by the importers".

X.

That the McKinley act (of 1890) "struck down the argument based on Departmental construction" (p. 18). This *ipse dixit* logically results from the utter misconception of the settled status of tapioca flour in the contemporary practice of the preceding twenty years. Since, as we have demonstrated, the article was never characterized as root flour, but always as tapioca, cassava or cassady, it follows that the McKinley act, by renewing the provision for free entry of these, sustained, instead of striking down, the argument based on previous construction.

As to the starch paragraph in this act, it was neither strengthened nor broadened, but instead of abstract provisions for several kinds of starch and "other starch", which might have been considered as including all substances chemically starches, the new act prescribed new limits of practical fitness. It was a narrowing change, whose proper effect was to remove all danger of the assessment of starch duties on substances elsewhere specially named, merely because chemically they belonged to the vast genus of starch.

XI.

The reference to the report of a Government chemist at the Port of New York (p. 21). We are surprised that our opponent cares to direct attention to this impertinent document, wherein a subordinate officer of the Government assumes to criticize the proceedings of court and counsel in the *Townsend* case. The same officer had in fact testified in that case, and participated in the classification of Townsend's goods as starch. On the adequacy of the evidence in the Townsend case, this court will be able to form its own conclusions unaided by the Government chemist at New York, since the Townsend record is here, and as the President of the National Starch Co. there testified that in his experience of many years of making and selling all kinds of starch throughout the country, he had never come in contact with tapioca and knew nothing about it, it seems clear that if the court was misled in that case, it was because this witness knew less about the practical aspects of the starch business than did the Government chemist at New York.

XII.

That there is nothing to show that the Chinese laundry use does not prevail in such laundries over the entire country, and that it is commonly so used (p. 22). Our opponent himself, on his page 4, quotes from the stipulation as to the facts: "That the article is fit for use as starch in the sense that by its use clothes may be starched, but it is not commonly used in laundry work as starch throughout the United

States, and is not known to be so used except on the Pacific coast".

Even were it so used generally by Chinese throughout the country, that use would still be exceptional as being confined to a limited, peculiar and unrepresentative class in the community, whose practices cannot possibly be supposed to have been contemplated by congress in legislating for articles according to their use or fitness for use.

XIII.

The Magone vs. Heller case is no authority for our opponent, but is in our favor. Its entire force was focused on the phrase "expressly used". Remove the word "expressly", thus making the provision in question parallel to that for starch, and it in inconceivable that the court would have decided as it did. Add the word "expressly" to the starch provision, and it becomes immediately manifest that tapioca flour is thereby excluded. We take direct issue with our opponent's assertion that "the phrase 'fit for use' is as sharply definitive as to plain intent as 'expressly used.'"

XIV.

If the purpose of paragraph 730 and similar paragraphs of the McKinley act seems clear to our opponent as being to admit free "specified forms of food," not only does that seem less clear to us, but we invite him to reconcile that intent with the express provisions

for free entry of cassava, the name of nothing but the merchandise in controversy, which he says is not edible, and sago, as distinguished from sago flour (695) the flour being the only known edible.

XV.

The argument based on prices (p. 23) seems completely misconceived. For many years prior to 1890, tapioca flour was uniformly admitted free, and during all that time its cost on our markets was less than those of starches generally. Since 1890 the practice has fluctuated, duty being sometimes exacted and sometimes not, and naturally the price has accordingly fluctuated, and sometimes equalled that of the starches. The proofs showed and the courts found that prior to 1890, when uniformly cheaper, the article was never habitually used as starch nor came into competition with starches. Of course nothing is taken from the strength of this demonstration by the fact that at a later period, when also it was not a competitor of starches, its price may have been no cheaper than heirs.

No other arguments appear to be advanced in the Government brief.

ALBERT COMSTOCK,
Aldis [redacted] B. BROWNE,
CHARLES PAGE,
Counsel for Petitioner.